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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Parrish Enterprises, Ltd.

Serial No. 76572755

Nicholas D. Rouse of Dunlap, Coddling & Rogers, P.C. for
Parrish Enterprises, Ltd.

Anne T. Madden, Trademark Examining Attorney, Law Office
103 (Michael Hamilton, Managing Attorney).

Before Quinn, Bucher, and Drost, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On January 29, 2004, applicant Parrish Enterprises,
Ltd. filed an application to register the mark SEEKER in
standard character form on the Principal Register for
"fishing rods and fishing rod blanks" in Class 28. The
application alleges a date of first use anywhere and a date
of first use in commerce of June 1985.

The examining attorney has refused to register
applicant's mark under Section 2(d) of the Trademark Act
(15 U.S.C. § 1052(d)) on the ground that it is likely to

cause confusion with a prior registration for the mark FISH SEEKER in typed or standard character form for "fishing equipment namely, a device attached to fishing rods to determine depth" in Class 28.¹ The registration contains a disclaimer of the term "Fish."

The examining attorney argues (Brief at unnumbered p. 5) that:

the goods overlap as both applicant and registrant are providing sporting goods used for fishing... It is highly likely that applicant will sell its fishing rods and blanks in the same sporting goods stores as registrant in addition to advertising and selling online. Registrant's depth devices are attached to fishing rods. Clearly, they can be used with applicant's goods.

In addition, the examining attorney also asserts that as "both are used with fishing equipment, both marks may suggest that a user is seeking the best fish in the water." Brief at unnumbered p. 4.

On the other hand, applicant argues that "the term SEEKER alone connotes an image of someone or something that is seeking 'something.' In connection with fishing that 'something' may be landing a 'trophy' sized fish, experiencing the sensation of hooking and fighting a fish, or even finding a few hours of peace and quiet." Brief at

¹ Registration No. 1,538,297, issued May 9, 1989. Affidavits under Section 8 and 15 have been accepted or acknowledged.

pp. 3-4. In contrast, applicant submits that registrant's mark "connotes the image of an object traveling through water to the exact depth and location of a fish waiting to be caught." Brief at 3. Furthermore, applicant argues that purchasers of the goods will exercise a great deal of care, that "the cost of fishing rods offered by Applicant range from \$90.00 to \$800" (Brief at 4); that registrant's goods "are far less expensive and sold at a price of approximately \$5.00" (Brief at 5); that there has been no actual confusion; and that applicant has sold hundreds of thousands of its items (203,233 fishing rods and 161,564 of its fishing rod blanks) for sales grossing \$14,200,192 for fishing rods and \$3,975,630 for fishing rod blanks. See Declaration of James Parrish.

After the refusal was made final, applicant filed this appeal.

When there is a question of likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind

that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We begin by comparing the similarities and dissimilarities of the marks. The marks are SEEKER and FISH SEEKER. Inasmuch as the marks are in typed or standard character form, the only difference in the marks is the presence of the word "Fish" in registrant's mark. The marks are otherwise identical because they both contain the same word "Seeker." Registrant has disclaimed the term "Fish" and its goods are fishing equipment that is attached to a fishing rod so it is a term with a highly descriptive meaning when used on these goods. Such highly descriptive terms are often given little weight in likelihood of confusion determinations. "Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'" Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), quoting, In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985). See also In re Chatam International Inc., 380 F.3d 1340, 71 USPQ2d 1944, 1946

(Fed. Cir. 2004) ("With respect to GOLD, the Board determined that the term denotes a premium quality, a descriptive term offering little to alter the commercial impression of the mark." Court found that as a result the board had good reason to discount the term's significance); and In re Code Consultants Inc., 60 USPQ2d 1699, 1702 (TTAB 2001) (Disclaimed matter is often "less significant in creating the mark's commercial impression").

While we have considered the marks as a whole, the presence of the term "Fish" in the registrant's mark does not have much trademark significance. Both applicant's and registrant's goods are fishing equipment and the object of both fishing rods and fishing devices is to help fisherman catch fish. In this case, we find that the term "Fish" is more likely to reinforce the similarities of the marks rather than to give purchasers a basis to distinguish the mark. Indeed, applicant itself argues that: "the term SEEKER alone connotes an image of someone or something that is seeking 'something.' In connection with fishing that 'something' may be landing a 'trophy' sized fish." Brief at 3. Applicant's argument that "Seeker" alone connotes seeking something like a trophy-size fish would be very similar to the connotation of the cited registered mark

FISH SEEKER, which can also have the connotation of seeking a fish, including a trophy-sized fish.

While there is a difference between the marks' sound and appearance created by the additional word "Fish" in registrant's mark, the identical nature of the dominant word "Seeker" would minimize this difference. Furthermore, their meanings and commercial impressions would be very similar and, to some degree, identical. While applicant argues that the registered mark is highly suggestive, there is little evidence other than the mark itself that supports this argument.² Therefore, we conclude that the marks in their entireties are very similar and this factor favors a conclusion that there is a likelihood of confusion. See In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) (Federal Circuit held that, despite the addition of the words "The" and "Cafe" and a diamond-shaped design to registrant's DELTA mark, there was a likelihood of confusion).

² Applicant also argues that "FISH SEEKER when used with fishing equipment is merely descriptive." Brief at 3. We cannot consider this argument because it would be an impermissible attack on the cited registration. In re Peebles Inc., 23 USPQ2d 1795, 1797 (TTAB 1992) ("Applicant's suggestion that registrant's mark is descriptive may not be considered inasmuch as that allegation comprises an attack on the validity of registrant's registration which is not permitted in an ex parte appeal proceeding").

Next, we address whether the goods of applicant and registrant are related. Applicant's goods are fishing rods and fishing rod blanks and registrant's goods are devices attached to fishing rods to determine depth. Both applicant's and registrant's goods are fishing equipment and the identification of registrant's goods clearly indicates that its goods are designed to be used with fishing rods. Applicant acknowledges (Brief at 4), and we agree, that the "question of likelihood of confusion must be determined on the basis of the goods set forth in Applicant's application and those in the cited registration." Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods [or services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods [or services], the particular channels of trade or the class of purchasers to which the sales of goods [or services] are directed"). See also Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective

descriptions of goods"). We also do not read limitations into a registration's identification of goods or services. Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983)("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration").³

Therefore, while applicant argues that its goods can cost up to \$800 and registrant's goods may cost as little as \$5, there are no limitations in either applicant's and registrant's identifications of goods. Therefore, we must presume that applicant's and registrant's fishing items encompass goods in all price ranges including less expensive fishing rods and fishing rod blanks and more expensive fishing devices to determine depths. Also, if as applicant suggests, registrant's goods are relatively inexpensive (approximately \$5), this fact would increase

³ Applicant has invited "the Board to visit Applicant's website" (Brief at 4). In its Reply Brief at 1, applicant has explained that it previously invited the examining attorney to visit the site. "A mere reference to a website does not make the information of record. In order to review the facts in this case, there should be evidence in the record" In re Planalytics Inc., 70 USPQ2d 1453, 1457 (TTAB 2004). Moreover, as discussed above, applicant's website would not limit how we consider its goods that are identified simply as fishing rods and fishing rod blanks.

the likelihood of confusion.⁴ At that point, fisherman may be inclined to make impulse purchases of these items and assume that these goods are related to the source of applicant's fishing rods inasmuch as these devices are used with applicant's fishing rods.⁵

Furthermore, there are no limitations on prospective purchasers and there is no evidence that would support an argument that purchasers of fishing equipment are sophisticated purchasers. We must presume that these purchasers would include all types of fisherman including those new to the sport and those who have only a limited interest in fishing. We also add that "even careful purchasers are not immune from source confusion." In re Total Quality Group Inc., 51 USPQ2d 1474, 1477 (TTAB 1999). These fishermen would likely be confused about the source

⁴ With its Reply Brief, applicant submitted a printout from the USPTO's assignment records that shows the current owner of the cited registration. We will consider this evidence that simply updates the status of the cited registration. See TBMP § 704.03(b)(1)(A) (2d ed. rev. 2004). We will also consider applicant's submission of what is apparently a webpage from registrant's website. It is very similar to a webpage that applicant submitted earlier and that the examining attorney in her brief now attacks because it does not clearly refer to the registrant.

⁵ The examining attorney also submitted several registrations to show that the same entities have registered an identical mark for fishing rods and various fishing devices. See, e.g., Registration No. 1,455,477 (fishing equipment including, fish attracting devices, bait, and rods), No. 2,346,450 (fishing rods, lures, reels, rod holders, fly lines and gaff holders), and No. 2,436,312 (fishing rods and fishing hand tools).

of fishing rods and fishing devices attached to fishing rods that are marketed under marks as similar as applicant's and registrant's.

Applicant's final argument is that there has been no actual confusion between the marks in this case. Applicant argues that the marks "have been simultaneously used in the fishing equipment market for nearly twenty-one (21) years... However, despite ample time and opportunity for confusion to have arisen, Applicant is unaware of any evidence of any actual confusion." Brief at 6. Applicant points to more than \$18 million in sales of its fishing rods and fishing rod blanks over that period and more than \$800,000 in advertising. Applicant also cites the case of In re General Motors Corp., 23 USPQ2d 1465 (TTAB 1992) as support for its argument that even in ex parte cases, a lack of actual confusion can be an important factor in determining that there is no likelihood of confusion.

We begin by noting that the test is likelihood of confusion and that the lack of actual confusion does not normally indicate that there is no likelihood of confusion.

With regard to the seventh DuPont factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. See In re Bissett-Berman Corp., 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of

instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, J.C. Hall Co. v. Hallmark Cards, Inc., 52 CCPA 981, 340 F.2d 960, 964, 144 USPQ 435, 438 (CCPA 1965), especially in an ex parte context.

Majestic Distilling, 65 USPQ2d at 1205. See also Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983); J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991).

The General Motors case is clearly distinguishable from the facts of this case.

Applicant has submitted evidence sufficient to demonstrate that for automobiles, its "GRAND PRIX" mark has achieved a degree of renown. Besides sample advertisements and representative stories which mention or discuss applicant's "GRAND PRIX" automobiles, the record reveals that during a 28-year period, 2,695,434 of such cars were produced by applicant. Beginning with 30,195 automobiles in the 1962 model year, production has ranged from a low of 16,542 vehicles in 1987 to a high of 288,430 vehicles in 1977, with sales of 107,500 automobiles in 1989. In this nearly 30-year era, production of between 50,000 and 100,000 "GRAND PRIX" cars was accomplished 12 times; production of between 100,000 and 200,000 was reached six times; and production in excess of 200,000 vehicles was achieved four times. Only on six occasions has production been fewer than 50,000 cars annually, including the all-time low set in 1987. The total production figures are significant since they reflect the long-term availability of "GRAND PRIX" automobiles in the marketplace and resulting familiarity of the purchasing public with them. Sales

and advertising thereof, it additionally appears, have been continuous and national in scope. Given such prominence, and the consequential renown achieved by applicant's "GRAND PRIX" automobiles over a period of approximately 30 years, it seems highly probable that at least one instance of confusion with registrant's "GRAND PRIX" replacement automotive parts would have occurred. Yet, according to the affidavits submitted by applicant, not one incident of actual confusion has been reported...

Edward S. Lechtzin avers in his affidavit ... (i) "in the 27 years that PONTIAC GRAND PRIX vehicles have been sold in the marketplace, no consumer has contacted Pontiac Division, General Motors Corporation, requesting information about TBC Corporation's GRAND PRIX products"; (ii) "in over 27 years, no one at Pontiac Division, General Motors Corporation, has been asked whether a buyer should use these TBC GRAND PRIX products with their [sic] GRAND PRIX automobile"; and (iii) "Pontiac Division, General Motors Corporation, has received no inquiry in those years concerning TBC Corporation's GRAND PRIX products."

We recognize, of course, that the above is one-sided inasmuch it provides only applicant's experience in the marketplace and not that of registrant. Normally, in the absence of a detailed consent agreement, the registrant has no opportunity to be heard in an ex parte proceeding of this type and the Board, therefore, is not in a position to meaningfully assess whether the claimed period of contemporaneous use has provided ample opportunity for confusion to have arisen.

General Motors, 23 USPQ2d at 1470 (footnote omitted).

The General Motors case involved an applicant that had sold more than 2,000,000 vehicles. The evidence showed that these vehicles were advertised on a national scale. Under these circumstances, it was reasonable to conclude that there was ample opportunity for confusion to occur

and, therefore, the applicant's assertion that there had been no actual confusion was significant.

In the present case, the evidence is nowhere near as persuasive. We have no specifics on the nature of applicant's advertising nor can we assume that there would have been significant opportunities for the same consumers to encounter both marks. Therefore, while we have considered applicant's evidence and its assertion in its president's declaration that there has been no actual confusion, we cannot conclude that there is no likelihood of confusion here. The marks FISH SEEKER and SEEKER are very similar and the goods are very closely related. Under these circumstances, confusion is likely.

Decision: The examining attorney's refusal to register applicant's mark on the ground that it is likely to cause confusion with the cited registered mark used in connection with the identified goods under Section 2(d) of the Trademark Act is affirmed.